with their networks" is not to be credited because their legal challenge "indicates . . . that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them." Id. BellSouth has neither offered nor begun to take the steps needed to provide entrants with the information and arrangements they will need to gain access to and physically combine the individual elements of its network. Crafton Aff. ¶ 22.

C. BellSouth Does Not Offer Nondiscriminatory Access To Its Operations Support Systems

As the Commission has recognized, no BOC's local monopoly can be broken unless and until that BOC can "switch over customers as soon as the new entrants win them" -- and can do so regardless of whether that entrant has chosen to compete through "construction of new facilities, purchase of unbundled elements," or "resale" of the BOC's services. Ameritech Michigan Order ¶ 21. For this reason, this Commission has repeatedly emphasized the core requirement that new entrants have "the same access to the BOCs' operations support systems that the BOCs or their affiliates enjoy." Id.[19] Absent such proof, "entry into the local telecommunications market" simply is not "truly available." Id.

To determine whether nondiscriminatory access is truly available to a BOC's OSS, the Commission has set forth a "two-part inquiry." Id. ¶ 136. First, the Commission will determine whether the BOC has "deployed" the kind of systems capable of providing nondiscriminatory access and has given new entrants the "assistance" and information they need

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[19] See, e.g., Ameritech Michigan Order ¶¶ 130, 132, 135, 137, 139, 143; Local Competition Order ¶¶ 518, 519, 521, 523; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, Second Order on Reconsideration, FCC 96-976 (rel. Dec. 13, 1996), ¶ 9, ¶ 11 & n.32 ("Second Order on Reconsideration").

"to understand how to implement and use" those systems. Id.; see id. ¶ 137. Second, the Commission will examine the quantitative and qualitative evidence available concerning the testing and "actual commercial usage" of the BOCs' interfaces to determine whether, in fact, new entrants are receiving (or could promptly obtain upon request) nondiscriminatory access to each OSS function (preordering, ordering/provisioning, maintenance/repair, billing) for each method of market entry (facilities, UNEs, resale). Id. ¶ 138; see id. ¶¶ 139-43. Notably, the Commission gave explicit and detailed guidance as to the quantitative evidence of performance that must accompany a serious application under section 271. Id. ¶ 212; see Pfau Aff. at ¶¶ 10-16 and Att. 1 (identifying the required performance data).

BellSouth's application fails -- indeed, defaults -- on both counts. The interfaces that BellSouth has thus far deployed (and which are not even mentioned in its SGAT) are inherently incapable of providing new entrants with nondiscriminatory access to most OSS functions. Moreover, BellSouth has failed to provide CLECs with the specifications, business rules, training, and other assistance needed to make even these limited interim interfaces operate efficiently. Similarly, BellSouth has not provided most of the performance data the Commission requires, and what little it has submitted confirm that BellSouth is providing new entrants with grossly inferior service.

1. BellSouth Has Not Deployed Interfaces Capable Of Providing Nondiscriminatory Access

On its face, BellSouth's SGAT fails to comply with section 271. The provision on access to OSS is written as a concession that BellSouth has not completed development of electronic interfaces capable of providing CLECs with access to BellSouth's OSS that is equivalent to what BellSouth enjoys:

> BellSouth provides CLECs unbundled access to several operations support systems. Access to these support systems will be via electronic interfaces. Where not currently operational, BellSouth is developing operational electronic interfaces to these systems.

BellSouth SGAT II.B.5 (emphasis added). This provision -- which amounts to a "paper promise" within a "paper promise" -- is an admission that electronic interfaces are not yet generally available from BellSouth. The remainder of the SGAT -- which fails to contain any express commitment to provide the specific kinds of electronic interfaces needed to offer genuine nondiscriminatory access to large CLECs -- compounds the speculative nature of BellSouth's commitments. See Bradbury Aff. ¶¶ 24, 123, 218-219 & nn.132-133. Such promises of future compliance are inherently inadequate to demonstrate compliance with section 271. Ameritech Michigan Order ¶ 55; see Bradbury Aff. ¶¶ 15, 53, 102, 185, 219. Indeed, the Alabama Public Service Commission has recently declined to approve a similar SGAT filed by BellSouth in that state, because BellSouth has not proved it is currently providing nondiscriminatory access to its OSS.[20]

Even looking beyond the SGAT, it is plain that, with respect both to unbundled network elements and to resale, BellSouth has failed to deploy electronic interfaces capable of providing AT&T with the same access to BellSouth's OSS that is available to BellSouth, and has compounded this problem by providing AT&T with inadequate information and support regarding these interfaces.

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[20] Alabama PSC SGAT Order at 7 (October 16, 1997) ("It appears to us that BellSouth's OSS interfaces must be further revised to provide nondiscriminatory access to BellSouth's OSS systems as required by §251(c)(3) of the '96 Act. We have concerns that such nondiscriminatory access is not currently being provided.").

a. **Resale:** BellSouth has not yet deployed interfaces that are capable of providing equivalent access to the OSS functions of pre-ordering, ordering and provisioning, billing, or repair and maintenance. Each of its interim interfaces have inherent limitations that even under optimal operating circumstances would place the CLEC at a distinct competitive disadvantage as against BellSouth.

i. **Pre-ordering:** The only interface that BellSouth has currently made available for pre-ordering is a web-based proprietary system called Local Exchange Navigation System (LENS). LENS is inherently incapable of satisfying BellSouth's obligations, for two reasons. First, because LENS is not designed to be a machine-to-machine application, CLEC customer representatives must manually type in all of the pre-ordering information twice -- once into LENS, and a second time into the CLECs' system -- for any given preordering transaction. This dual data entry significantly increases the expense of preordering and the risk of error. These are costs that BellSouth does not bear and that make a web-based interface inherently discriminatory. See Bradbury Aff. ¶ 25 n.19 (citing conclusions to that effect of the Department of Justice and several state commissions).

BellSouth's assertion (see Stacy OSS Aff. ¶¶ 43-45) that CLECs should devise their own workarounds is disingenuous. The only potentially practical alternative for a large CLEC -- integrating LENS with EDI through development of a Common Gateway Interface (CGI) -- would require BellSouth to provide technical specifications that BellSouth has admitted it has not provided and that it concededly "'discontinued'" work on five months ago. Bradbury Aff. ¶ 40 & n.29 (quoting BellSouth testimony); see id. ¶¶ 33-45 (describing BellSouth's intentional failure to provide specifications needed for CGI and inadequacy of other alternatives). Thus BellSouth's

own actions have ensured that no large CLEC could successfully avoid the dual entry problem LENS imposes.

Second, contrary to the state commission's cursory statements (see BellSouth/SCPSC Compliance Order at 35[21]), LENS does not provide CLECs with the same pre-ordering capabilities that BellSouth provides its own customer representatives. Unlike BellSouth, CLECs dependent upon LENS are unable to (1) reserve a firm due date for most transactions; (2) validate a customer's address electronically and once at the outset of the call, rather than manually and repeatedly, screen after screen, while the customer is on the line; (3) match BellSouth's ability to access and reserve telephone numbers; (4) have ready access to customer service record information; or (5) obtain advance notice of system changes. Bradbury Aff. ¶¶ 48-76. Contrary to BellSouth's assertion, not only would a CLEC's decision to use LENS in its so-called "Firm Order Mode" (i.e., for ordering as well as pre-ordering) not solve all of these problems, it would create additional disadvantages that would further undercut the CLEC's ability to compete. Id. ¶¶ 80-86.

ii. Ordering and Provisioning: Because BellSouth has not yet deployed its "permanent" EDI interface, large CLECs must choose between "PC EDI" (a personal computer-based software package designed for CLECs with small order volumes) and "interim Phase I EDI" (designed for larger CLECs). See Bradbury Aff. ¶¶ 97-99 & nn.61-64. Neither option affords a large CLEC access equivalent to what BellSouth enjoys.

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[21] Order Addressing Statement And Compliance With Section 271 Of The Telecommunications Act of 1996, South Carolina PSC Docket No. 97-101-C, Order No. 97-640 (July 31, 1997) ("BellSouth/SCPSC Compliance Order").

Interim Phase I EDI is inherently discriminatory for two reasons. First, CLECs cannot use it to order the full range of BellSouth services (including services accounting for hundreds of millions of revenue dollars) or to submit complex orders as BellSouth itself does. Id. ¶¶ 111-113 & nn.73-75. Second, many of the services and transactions for which it is intended must be done manually, rather than electronically. For example, with Phase I EDI, not only do many simple orders fall out for manual processing, but BellSouth transmits back to CLECs basic messages -- such as error notices, notices of rejection, jeopardy notices, and status reports -- only via facsimile rather than electronically over the interface. Id. ¶¶ 102-110. Third, messages delivered over Phase I EDI are delivered not in real time but via a batch process, causing delays of up to 30 minutes for receipt of orders and increasing the risk that due dates and telephone number requests will not be honored. Id. ¶¶ 115-117. Finally, the firm order confirmation and completion notices that BellSouth transmits are barebones transmissions that do not identify the services actually ordered and installed by BellSouth. Id. ¶¶ 118-119.

iii. **Repair and Maintenance**: BellSouth also has not yet deployed an interface capable of providing CLECs with machine-to-machine access to repair and maintenance functions. Its EBI interface has only "'limited functionality'" (id. ¶ 126 (quoting Stacy Aff. (OSS) ¶ 82)) that makes it unsuitable for use with basic resold services, and its TAFI interface not only is incapable of providing status information on many kinds of trouble reports but is a proprietary non-standard interface that cannot be integrated with a CLEC's systems and thus requires dual data entry. Id. ¶¶ 128-132.

b. **Future Deployment:** BellSouth has plans to deploy interfaces that, for ordering and provisioning and repair and maintenance, would have at least the capability of

providing non-discriminatory access. Id. ¶¶ 8 n.6, 99 & n.62, 125, 133-139. But these interfaces are not available today, and BellSouth's promises to deploy them in the future are insufficient to meet its burden of proof under Section 271. Ameritech Michigan Order ¶ 55. As for preordering, however, the future is even more bleak. Although in March, 1997, AT&T and BellSouth agreed to specifications for an electronic communications interface that would have eliminated the many functional limitations that plague the current LENS system, in July, 1997 BellSouth announced that it would not honor those specifications and would instead deploy an interface that will perpetuate those same LENS problems. Bradbury Aff. ¶¶ 87-93. At this point, therefore, BellSouth has not even made a paper promise to deploy a nondiscriminatory preordering interface.

c. **Inadequate Assistance:** Despite this Commission's admonition that BOCs must "adequately assist[] competing carriers to understand how to implement and use all of the OSS functions available to them" (Ameritech Michigan Order ¶ 136), BellSouth's record is one of resistance and neglect. AT&T first requested electronic access to BellSouth's OSS more than two years ago, in the aftermath of Georgia state legislation authorizing local service competition. Bradbury Aff. ¶¶ 113 & Att. 1. For months BellSouth refused to acknowledge any obligation to provide such access, claiming that a "'PC to PC fax interface'" was all it was required to provide. Id. at Att. 1, pp. 5-6 (quoting BellSouth letter to AT&T of May 16, 1996). AT&T thus had to seek and obtain an order from the Georgia Public Service Commission compelling BellSouth to provide electronic interfaces, which the Georgia PSC has since had to reaffirm twice in response to continued BellSouth opposition and footdragging. Id. Att. 1, pp. 3-8.

Given this record, it should not be surprising that BellSouth's assertion (Br. 22) that it has "provided CLECs with all information . . . [and] training they may need to use BellSouth's systems effectively" is untrue. BellSouth has consistently refused to provide AT&T with complete and accurate information regarding its business rules, which the Commission has recognized are crucial to efficient processing of CLEC orders. Ameritech Michigan Order ¶ 137; see Bradbury Aff. ¶¶ 141-170. Similarly, despite repeated requests from AT&T for training in the use of LENS, BellSouth has provided only two sessions that essentially consisted of demonstrations of the LENS system, has offered trainers who have been unable to answer questions concerning error messages or required procedures beyond the narrow "script" that BellSouth created for the sessions, and has failed to update its LENS Users Guide for more than three months, thereby leaving CLECs without guidance on how to use numerous important functions that BellSouth has changed or added since then. Id. ¶¶ 170-178.

d. UNEs: In the Ameritech Michigan Order, the Commission made it clear that BOCs must ensure that CLECs are equally able to gain nondiscriminatory access to OSS for each of the three entry routes. Ameritech Michigan Order ¶ 133. In particular, the Commission recognized that BOCs must provide CLECs with nondiscriminatory OSS access for serving customers not only with individual network elements, but through "combinations of network elements" as well. Ameritech Michigan Order ¶ 160.

BellSouth has failed to comply with these obligations. The interim Phase I EDI interface cannot be used to place electronic orders for any individual unbundled network elements -- such orders, if transmitted, would simply fall out for manual processing. Id. ¶ 58; see Bradbury Aff. ¶¶ 99, 184. It is also incapable of being used to order existing UNE combinations: BellSouth's

witness Mr. Stacy admits that BellSouth "has not yet undertaken [the] development" needed to make "our electronic interfaces . . . accommodate UNE combinations." Stacy OSS Aff. ¶ 60. BellSouth similarly has made no effort to provide the technical interface specifications or other assistance entrants will need to order network elements that the entrants themselves would combine. Bradbury Aff. ¶¶ 181-182 & Att. 37. Finally, the pre-ordering, maintenance and repair, and billing interfaces that BellSouth offers in connection with UNEs do not begin to provide nondiscriminatory access. See id. ¶¶ 51 n.38, 183-191.

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In summary, BellSouth has failed even to commit in its SGAT to provide nondiscriminatory electronic interfaces, has not yet deployed interfaces that are capable of meeting the statutory requirements, and has not adequately supported the interfaces it has deployed. For these independent reasons, BellSouth has not met its checklist obligations with respect to OSS. This noncompliance is further confirmed by the meager record BellSouth submitted on its performance to date, which illustrates how far BellSouth has to go to open its markets to competition.

2. BellSouth's Performance To Date Confirms That Its Systems Are Not Operationally Ready.

BellSouth's application does not begin to satisfy the Commission's further requirement that BOCs submit data demonstrating that their systems provide nondiscriminatory access. Ameritech Michigan Order ¶ 128. Not only has BellSouth failed to provide data for most of the performance measurements specifically identified as necessary by the Commission, it has actually withheld relevant performance data from the Commission which conclusively demonstrate that BellSouth is not providing nondiscriminatory performance for CLECs.

Furthermore, in the very few instances in which BellSouth provides comparative data on its performance for CLECs and for its own local retail operations, BellSouth attempts to conceal its discriminatory behavior by presenting its data in novel and inappropriate ways that obscure meaningful performance comparisons and conceal its discrimination. Ironically, even with these distortions, BellSouth's own data confirm that it is not providing nondiscriminatory performance for CLECs.

Before discussing these defects in more detail, it should be noted that BellSouth's legal objection to providing the performance data that the Commission requires is frivolous. BellSouth claims that "the Commission may not enforce substantive performance standards for other checklist items under the rubric of access to OSSs" because "[w]hat happens after CLECs' requests have made it through BellSouth's supporting systems is governed not by the Act's OSS provisions but rather by the checklist requirements (if any) that address the underlying item ordered." BellSouth Br. 32. Nowhere does BellSouth attempt to explain how, in practice, this purported distinction would make any difference, nor could it, given that the Act independently and expressly requires nondiscriminatory access to both UNEs and resale. E.g. §§ 251(c)(3), 251(c)(4)(B), 271(c)(2)(B)(ii), (xiv). The "rubric" under which the Commission discusses the BOC's provision of nondiscriminatory access is thus immaterial, because the obligation to provide such access is founded directly in the Act.

a. **BellSouth omits most performance measures:** In its Ameritech Michigan decision, the Commission provided substantial guidance to BOCs concerning the performance data needed to show that nondiscriminatory access is being provided to CLECs. Thus, in addition to its extended analysis of several performance measures which the Commission found

essential to any showing that parity is being provided to CLECs, including average installation intervals and the timeliness of firm order confirmations and order rejections, the Commission identified a number of additional performance measurements that should be submitted with future applications under Section 271, including comparative performance data for unbundled network elements, service order and provisioning accuracy, held orders, and bill quality and accuracy. See Ameritech Michigan Order ¶¶ 164-172, 185-188, 212. Further guidance was also provided in Appendix D of the Commission's recent Bell Atlantic/NYNEX Merger Order, which listed 22 performance measurements which those BOCs were required to monitor and report to the Commission.[22]

Despite this guidance, BellSouth has failed to submit data on any of the following performance measures found to be necessary in the Commission's prior orders: (1) average installation intervals, (2) service order accuracy or provisioning accuracy, (3) held orders, (4) the timeliness of firm order confirmations, (5) the timeliness of order rejections, (6) the timeliness of order completion notifications, (7) bill timeliness, (8) bill quality and accuracy, or (9) comparative performance data for unbundled network elements. Pfau Aff. ¶¶ 23-46. These omissions are fatal to BellSouth's application. As the Commission stated with respect to average installation intervals in its Ameritech Michigan Order, "[w]ithout data on average installation intervals comparing [the BOC's] retail performance with the performance provided to competing carriers, the Commission is unable to conclude that [the BOC] is providing nondiscriminatory

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[22] Application of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp., File No. NSD-L-96, Memorandum Opinion and Order, FCC 97-286 (rel. August 14, 1997) ("Bell Atlantic/NYNEX Merger Order").

access to OSS functions for . . . ordering and provisioning," and thus unable to approve the BOC's Section 271 application. Ameritech Michigan Order ¶ 167.

b. BellSouth's data confirm that its performance is discriminatory: Beyond this failure of proof, BellSouth has deliberately withheld from the Commission data that it has been collecting on the return of firm order confirmations ("FOCs") and order rejections to CLECs -- data which show quite clearly that BellSouth's performance for CLECs is discriminatory. Indeed, rather than provide these data to the Commission, BellSouth asserts that such data are "not available at this time." Stacy Performance Aff. ¶ 43. In fact, BellSouth has been submitting data on its performance in returning FOCs to CLECs in state commission proceedings since mid-July, and it has collected and reported data on the return of both FOCs and order rejections to AT&T pursuant to the terms of the AT&T-BellSouth contract. Pfau Aff. ¶¶ 37-38, 43.

BellSouth's performance data for August, which were provided to AT&T in September, show that BellSouth is returning firm order confirmations to AT&T within 24 hours only 62 percent of the time, or less than two-thirds of the time. Pfau Aff. ¶ 38 & Att. 5. Moreover, this poor performance occurred despite the fact that BellSouth has unilaterally limited its FOC measure to only those "orders that flow through mechanically and entirely without human intervention," thereby excluding from its FOC measurement those CLEC orders most likely not to meet the contractual standard. Pfau Aff. ¶ 41. Even when laundered in this way, BellSouth's data establish that BellSouth fails to meet even its contractual obligations, let alone provide AT&T with the virtually instantaneous response that its own customer service personnel receive and that the Act requires.

Likewise, BellSouth's own data show that it is not providing nondiscriminatory performance to CLECs with respect to the timeliness of order rejections. AT&T, like BellSouth's own personnel, should receive electronic notice of order rejections "relatively instantaneous[ly]." Ameritech Michigan Order ¶ 188. But BellSouth's data show that it provides notice of order rejection to AT&T even within one hour only 6 percent of the time. Pfau Aff. ¶ 44. This poor performance results directly from BellSouth's failure to mechanize the order-rejection process, in violation not only of the Act but of its contractual obligation to provide AT&T with electronic order rejection notices "no later than March 31, 1997." AT&T-BellSouth Agreement, Sec. 28.6.4; Pfau Aff. ¶ 44.

BellSouth's failure to provide the same fully electronic processing of CLEC orders that it provides for its own local retail orders is also confirmed by the limited data that BellSouth has provided on order flow-through. Those data show that only 26.2 percent of CLEC orders in July and only 33.7 percent of CLEC orders in August were processed by BellSouth on a flow through basis without human intervention. See Bradbury Aff. ¶¶ 106, 204.[23]

c. **BellSouth's comparative data further confirm discriminatory performance:** In the very few instances in which BellSouth submits comparative data regarding its performance for both CLECs and its own local retail operations -- a grand total of seven resale and four trunking measurements (see Stacy Performance Aff. Ex. WNS-9) -- BellSouth's

[23] In light of the Commission's further requirements that all BOC performance measures must be "clearly defined" and that a BOC's section 271 application must be complete when filed (Ameritech Michigan Order ¶¶ 212, 50), no weight should be given to BellSouth's attempt to avoid this obvious inadequate performance for CLECs by adjusting its order flow through data on the basis of some undisclosed "BST analysis" of "SOER errors" for which BellSouth provides no information. See Bradbury Aff. ¶ 207.

submission still does not establish nondiscriminatory performance for CLECs. In the first place, BellSouth's use of "statistical process control" charts to identify discriminatory conduct is inappropriate. Statistical process control was developed to monitor whether a single process that transforms inputs into outputs, such as a manufacturing operation, is operating within expected boundaries based on its historical performance. It was never designed nor intended to detect discrimination between two different classes of customers. Pfau Aff. ¶¶ 59-60.

Even if statistical process control could be applied to identify discrimination, however, BellSouth's application of the process here is plainly designed to conceal discrimination, not to reveal it. Thus, BellSouth has set its "control limits" so broadly as to create a virtual immunity from claims of discrimination. Pfau Aff. ¶ 61. Indeed, the test proposed by BellSouth for determining whether a difference in performance is discriminatory -- a disparity in performance in excess of three standard deviations from the mean -- has been specifically rejected as too lax by the courts in discrimination cases. See, e.g., Rendon v. AT&T Technologies, 883 F.2d 388, 397-98 (5th Cir. 1989); Pfau Aff. ¶ 62.

Even with these improper assumptions, BellSouth's statistical process control charts do not support its claim of nondiscriminatory performance. For August alone (the most recent month for which data are provided), BellSouth's charts actually demonstrate that its performance for CLECs was discriminatory (that is, outside of BellSouth's overly broad control limits) for 6 of the 28 resale performance measurements. Pfau Aff. ¶ 66. Moreover, BellSouth's charts for "residential resale non-dispatch" -- a category that accounted for 69 percent of CLEC order volume in August and 83 percent of BellSouth's order volume -- show that BellSouth's overall year-to-date performance for CLECs was discriminatory for 3 out of the 7 resale measures

provided by BellSouth, and that its performance in meeting residential resale non-dispatch provisioning appointments was far outside of BellSouth's control limits for every single one of the seven months covered by BellSouth's charts. Pfau Aff. ¶ 69. Thus, notwithstanding the one-sided assumptions upon which BellSouth's statistical process control charts are based, those charts actually demonstrate that BellSouth is not providing nondiscriminatory access to CLECs.

d. BellSouth has failed to demonstrate adequate capacity: BellSouth's claim that its systems have adequate capacity to handle CLEC transactions (Br. 23) is belied by AT&T's own experience. When AT&T modestly increased its order volume in August, the BellSouth Regional Street Address Guide ("RSAG") -- access to which is vital for the placing of orders -- became inaccessible for prolonged periods of time. The problem lasted for nearly a month. See Bradbury Aff. ¶¶ 251-257. If BellSouth's systems cannot handle volumes of this magnitude when AT&T is beginning its entry into the market, they certainly will be unable to handle the greater volumes to come.

Even leaving aside the RSAG problem, BellSouth's claims of sufficient capacity are facially absurd. The ability to handle "at least 5,000 service requests per day" regionwide (see BellSouth/SCPSC Compliance Order at 37) amounts to an average of only approximately 550 orders per day for each of the nine States in the BellSouth region -- inadequate on its face to support meaningful competition. Moreover, although it asserts that it has tested the capacity of its interfaces and systems, BellSouth's own witness concedes that stress testing has not been completed. BellSouth Br. 23; Stacy OSS Aff. ¶ 118. BellSouth, therefore, has not proven that its OSS are able to handle both present and reasonably foreseeable demand. Ameritech Michigan Order ¶¶ 137-138.

D. BellSouth Has Failed To Demonstrate That It Is Offering To Provide Unbundled Network Elements At Cost-Based Rates

To comply with its checklist obligations, BellSouth must demonstrate that interconnection and unbundled network elements are available to new entrants at cost-based rates set in accordance with the requirements of sections 251(c)(2),(3) and 251(d)(1)(A)(i). See § 271(c)(2)(B)(i), (ii). As the Commission recently confirmed, a petitioning BOC must include "all of the factual evidence on which the applicant would have the Commission rely," including "detailed information concerning how unbundled network element prices were derived." Ameritech Michigan Order ¶¶ 49, 291. Failure to provide such information is independent grounds for dismissing the application, because on pricing as on all other checklist issues, the "BOC applicant retains at all times the ultimate burden of proof that its application satisfies section 271." Id. ¶ 44; see Local Competition Order ¶ 680. Once again, rather than attempt to make the required showing, BellSouth has chosen to challenge the requirement.

BellSouth argues that, in light of the Eighth Circuit's decision in Iowa Utilities Board, the Commission has no authority even under section 271 to evaluate whether BellSouth's UNE-access and interconnection rates are cost-based. BellSouth Br. 37. In BellSouth's view, even for checklist purposes, the Commission must entirely defer to the state commission's findings, which it terms "conclusive." Id. Accordingly, rather than attempt independently to prove that its rates are cost-based, BellSouth relies entirely on the South Carolina PSC, which adopted BellSouth's statement that BellSouth's rates "are cost-based within the requirements of the 1996 Act." BellSouth/SCPSC Compliance Order at 55. BellSouth's argument is meritless for at least two reasons.

First, the Eighth Circuit concluded only that the Commission lacked jurisdiction to adopt rules under § 251(c) that would bind states in conducting the interconnection arbitration proceedings for which the Act makes them responsible, in the first instance, under section 252. See Iowa Utilities Board, 120 F.3d at 793-94. In the Eighth Circuit's view, a uniform interpretation of the federal pricing requirements will come, if ever, only after Supreme Court review of federal court challenges to the individual state decisions under section 252. In the meantime, however, nothing in the Eighth Circuit's decision strips the Commission of its jurisdiction or obligation to enforce these pricing provisions in proceedings -- such as those involving section 271 -- for which the Act grants the Commission exclusive jurisdiction.[24]

Indeed, section 271 grants the Commission exclusive and ultimate authority to determine compliance with each item of the competitive checklist, including proof that UNEs are provided "in accordance with the requirements of § 251(c)(3) and § 252(d)(i)." § 271(c)(2)(B)(ii). Notably, although section 271 places an obligation upon the Commission to "consult" with the state commission on checklist compliance (§ 271(d)(2)(B)), and to "give substantial weight" to the evaluation of the Department of Justice (§ 271(d)(2)(A)), it leaves the ultimate decision whether to "find[]" compliance with respect to "all of the items" solely in the hands of the Commission. § 271(d)(3). Far from requiring the Commission to defer to a state's determination of checklist compliance, these provisions confirm that the Act requires the Commission independently to make findings concerning checklist compliance, including with

[24] The Act also grants the Commission authority to enforce the pricing requirements in arbitration proceedings where the state declines to carry out its role, thus further confirming that Congress granted the Commission authority to apply its interpretation of the Act's pricing requirements in the proceedings over which it was given authority. See 47 U.S.C. § 252(e)(5).

respect to the Act's pricing requirements. The Commission thus correctly held in its Ameritech Michigan Order that it must continue independently to assess compliance with the Act's pricing provisions (id. ¶¶ 285-86), and that "a BOC cannot be deemed in compliance with . . . the competitive checklist unless the BOC demonstrates that prices for . . . unbundled network elements . . . are based on forward-looking economic costs." Id. ¶ 289. This holding is controlling here.

Second, the record demonstrates beyond any doubt that the UNE rates in BellSouth's SGAT were not set on the cost-basis required by the Act. Indeed, nothing could better illustrate the lawless consequences that acceptance of BellSouth's position would produce than consideration of the SCPSC's deliberate refusal to follow either this Commission's pricing rules or any coherent interpretation of the statute.

First, the SCPSC failed to set geographically deaveraged rates. Wood Aff. ¶¶ 16-20. As a result, the SGAT provides only a single, statewide price for interconnection and for each unbundled network element. See SGAT Att. A. This directly violates the statutory requirement that rates be set at cost, for loop costs are higher in rural than in urban areas. As the Commission recently reiterated, such deaveraging is essential "to account for the different costs of building and maintaining networks in different geographic areas of varying population density." Ameritech Michigan Order ¶ 292. By not deaveraging its rates, BellSouth is able to foreclose competition in more densely populated urban and suburban areas by setting rates well above its costs.

As for the UNE rates themselves, the only standard that the South Carolina PSC applied to UNE pricing was the venerable "Anything Goes." The South Carolina PSC admitted that it

had not "adopted a particular cost methodology" in approving the interim UNE rates. BellSouth/SCPSC Compliance Order at 56. Indeed, it could not have done so because no cost studies were even in evidence in the SGAT proceeding. Wood Aff. ¶ 23. Instead, the SCPSC plucked interim rates from a variety of sources, and then invented post hoc and absurd explanations for why those rates were cost-based. BellSouth/SCPSC Compliance Order at 55. Some of the SGAT rates are taken from the AT&T/BellSouth arbitration, but those rates in turn were based not on any cost studies but, at least for some of the most critical elements in the network, on the results of BellSouth's negotiations with a fledgling competitive access provider (ACSI). Wood Aff. ¶ 25. The SCPSC's explanation that these rates are cost-based because "the negotiated rates . . . were certainly not set by the parties without reference to the cost of the services to be provided" (Order at 55) is obviously far too sweeping: it would apply equally to any rate -- including those set according to the rate-of-return methodology expressly foreclosed by the Act.

The SCPSC's attempt to justify other rates as "within the FCC proxy rate ranges" (id. at 55) is unavailing, both because the loop rate actually exceeds the proxy rate, and because other rates -- such as for non-recurring charges -- have no proxies, and were not supported by any cost studies because BellSouth concededly failed to conduct them. See Wood Aff. ¶¶ 28, 35-36. And the tariff rates that the SCPSC relied upon in some cases exceeded any level that even BellSouth's studies could justify. Id. ¶ 34.

None of this is cured by the prospect of new rates following the South Carolina's cost proceeding later this year. Cf. Ameritech Michigan Order ¶¶ 50, 55. Indeed, BellSouth's filings in this and other regional proceedings confirm that, if the state commission continues to

follow BellSouth's lead, the result will be a new set of UNE prices far higher than the excessive interim rates now in place. Wood Aff. ¶¶ 40-41. Far from "encourag[ing] early entry" (BellSouth/SCPSC Compliance Order at 59), the prospect of facing even more unreasonable prices in the foreseeable future serves only further to discourage new entry. Carroll Aff. ¶¶ 28-29.

E. BellSouth Has Failed To Demonstrate That It Is Offering To Resell Its Services In Accordance With Sections 251(c)(4), 252(d)(3), and 271(c)(2)(B)(xiv)

BellSouth also has failed to comply in two fundamental respects with its checklist obligation to make telecommunications services "available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." § 271(c)(2)(B)(xiv).

1. **CSA Restrictions:** First, as AT&T and LCI set forth in their Motion to Dismiss, BellSouth fails to comply with section 251(c)(4) both by not making contract service arrangements available for CLECs to resell to all end-users, and by not offering to resell CSAs at a discounted rate. See AT&T/LCI Motion to Dismiss at 14-18. In addition to the points noted in that motion, BellSouth's refusal to permit CLECs to market CSAs to groups of customers who, in the aggregate, could satisfy those terms and conditions squarely violates 47 C.F.R. § 51.613. In addition, under the Commission's recent Texas Preemption Order, South Carolina's approval of the restriction is an unlawful entry barrier that violates section 253. In particular, while noting that a "continuous property restriction" did not "prohibit outright competing carriers from reselling . . . centrex services," the Commission nonetheless concluded that "enforcement of the provision effectively precludes new entrants from providing competitive centrex services through resale due to their inability to aggregate small users into a large group,

and thereby offer rates, services and features that are otherwise unavailable to a single user." Texas Preemption Order ¶ 220 (emphasis added). The Commission therefore preempted the provision as an unlawful restriction on the "resale" of a telecommunications service. Id.

The Texas Preemption Order thus confirms that BellSouth's restriction on CSA resale to existing customers is unlawful. That restriction, as well as the lack of any discount on CSAs, is highly anticompetitive. As the affidavit of Patricia A. McFarland explains, these restrictions enable BellSouth to seal off competition for existing CSA customers which BellSouth is now moving rapidly to lock up, and whose existing contracts already account for over $300 million in revenues over the next three to five years. McFarland Resale Aff. ¶¶ 28-36. These unlawful CSA restrictions are thus independent and sufficient reasons to deny BellSouth's application.

2. **Unlawful Wholesale Discount:** Second, BellSouth has not proven that its telecommunications services are available at "wholesale rates" as required by section 252(d)(3). Section 252(d)(3) requires that telecommunications services be available for resale at a wholesale rate that excludes the portion of the incumbents' retail rates "attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." § 252(d)(3). For the same reasons noted above with respect to UNE pricing, the Commission has both the jurisdiction and the obligation independently to make findings, for purposes of determining compliance with section 271(c)(2)(B)(xiv), whether a petitioning BOC is in compliance with its statutory obligation to make its services available for resale at wholesale rates "set at the retail rates less the portion attributable to reasonably avoidable costs." Ameritech Michigan Order ¶ 295.

BellSouth once again has declined to provide the Commission with the factual evidence it has requested and that is essential for the Commission meaningfully to assess whether BellSouth is offering a wholesale discount that complies with the statutory standard. BellSouth has chosen instead, in both its brief and its affidavits, to rely exclusively on the fact that the SCPSC set a 14.8 percent discount principally in reliance upon a study submitted by BellSouth. See BellSouth Br. 53; BellSouth Cochran Aff. ¶ 31 & Ex. A. While a one-page summary sheet describing one of two studies that BellSouth purportedly conducted is attached to Mr. Cochran's testimony, neither the underlying study nor a clear statement of the bases for the SCPSC's 14.8 percent rate are included.

Although the absence of proof is itself grounds for rejection, additional facts demonstrate that the 14.8 percent rate cannot possibly comply with the statute. First, in adopting the 14.8 percent rate, the South Carolina PSC explicitly "'agree[d] with BellSouth's study and its calculation that relies on the Act's 'avoided' cost standard and which calculates the wholesale discount based on the fact that BellSouth will continue to operate in a wholesale and retail environment.'" McFarland Resale Aff. ¶ 23 (quoting SCPSC Arbitration Order at 13). This methodology directly conflicts with that established by the Commission. In the Local Competition Order, the Commission considered and rejected the BOCs' proposal that the "LEC must actually experience a reduction in its operating expenses for a cost to be considered 'avoided' for purposes of section 252(d)(3)." Local Competition Order ¶ 911; see id. ¶ 884 & n.2121. That standard would have permitted incumbents to block reseller entry "by declining to reduce their expenditures to the degree that certain costs are readily avoidable." Id. ¶ 911. Instead, the Commission determined that "the avoided costs are those that an incumbent LEC

would no longer incur if it were to cease retail operations and instead provide all of its services through resellers." Id.

Second, relying on this incorrect methodology, the state commission adopted a BellSouth study that BellSouth labeled "FCC compliant" but which in fact diverged from the FCC's methodology in several respects. The South Carolina PSC then made unexplained adjustments to some of the cost categories that perpetuated the basic flaws. For example, even though this Commission presumed that a reasonable wholesaler would avoid 100 percent of operator services costs, BellSouth's self-proclaimed "FCC-compliant" study assumed that a wholesaler would avoid no such costs, and the South Carolina PSC, without explanation, adjusted that figure upward only to 30 percent. Similarly, even though the Commission presumed that a wholesaler would avoid 90 percent of product management costs, BellSouth's FCC-compliant study assumed that a wholesaler would avoid only 11.8 percent of such costs, and the South Carolina PSC (again without explanation) adjusted that figure only to 25 percent. McFarland Resale Aff. ¶ 24.

The record is insufficient to enable the Commission to determine definitively every way in which the state commission went wrong. But the methodology it endorsed was unquestionably what this Commission rejected. And the resulting discount is the smallest in the BellSouth region and one of the five smallest in the country, a fact that the state commissioners applauded when it was announced during the state proceedings. See McNeely Aff. ¶ 46; see also Carroll Aff. ¶ 30; McFarland Resale Aff. ¶ 24 n.7. It is over 2 percentage points below the bottom of the Commission's "default wholesale discount rate" (Local Competition Order ¶ 932), and over 5 percentage points below the national average. McFarland Resale Aff. ¶ 24 n.7. While these

deviations, in themselves, may not make the rate unlawful, their exceptional nature combined with the fact that they were arrived at by adoption of an unlawful methodology and unexplained adjustments at odds with Commission presumptions, and are unaccompanied by any further support, precludes any finding of compliance with section 252.

F. The SCPSC's Order Approving BellSouth's SGAT And 271 Application Should Be Accorded No Weight.

In its Ameritech Michigan Order, ¶ 30, the Commission stressed the important role state commissions could play if they develop a "comprehensive, factual record" concerning both BOC compliance with the requirements of section 271 and the status of local competition in order to fulfill their role under section 271(d)(2)(b). The Commission recognized, however, that some state commissions would develop a comprehensive record, while others would undertake only a "cursory review" of BOC compliance with section 271. Id. The Commission has discretion to determine what deference it should accord a state commission's determination. Id. The Commission will consider carefully determinations of fact by the state that are supported by a detailed and extensive record. Ultimately, it is the Commission's role to determine whether the factual record demonstrates that the requirements of section 271 have been met. Id.

Throughout its brief and supporting affidavits, BellSouth refers to the SCPSC's "exhaustive inquiry" (Br. ii), "detailed factual findings" (id.), and "in-depth analysis" (id. at 3), purportedly supporting the SCPSC's determination that BellSouth has met the competitive checklist. BellSouth therefore contends that the SCPSC's findings are entitled to "great weight" (id. at 18), and, indeed, that the Commission must give greater weight to the SCPSC's determinations than those of the Department of Justice, which must be accorded "substantial weight" under section 271 (id. at 18 n.13; 47 U.S.C. § 271(d)(2)(A)).

BellSouth's claims conflict not only with the statute but with the record of proceedings in the state. The views set forth in the BellSouth/SCPSC Compliance Order should be accorded no weight. For example:

-- The SCPSC did not independently consider the record but "rubber-stamped" both the SGAT and BellSouth's section 271 application by adopting, virtually verbatim (including typographical errors), the proposed 68-page order submitted by BellSouth.[25] McNeely Aff. ¶ 20. As a result, the "SCPSC's" order makes "findings" with regard to OSS, pricing, CLEC entry plans,[26] and other matters that ignore or blatantly misstate the record or applicable law.[27] Id. ¶¶ 21-46.

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[25] Unlike other state commissions, the SCPSC did not assign an administrative law judge or an SCPSC staff member to review the record and make preliminary findings and recommendations to the SCPSC regarding the checklist or other section 271 issues. McNeely Aff. ¶ 17.

[26] For example, the BellSouth/SCPSC Compliance Order (at 19), states that "ACSI . . . testified that it does not compete as a local service provider, but rather only as an access provider," when ACSI in fact testified that it "is reselling local exchange service" in four markets in South Carolina. Testimony of James Falvey, ACSI, SCPSC Docket 97-101-C, Vol. 7, at 350 (July 10, 1997)("Falvey Testimony"). The BellSouth/SCPSC Compliance Order (at 19) also "finds" that ACSI has no plan to place facilities in South Carolina, when ACSI made clear that it "intend[s] to become a facilities-based provider in South Carolina" and that it intends to install a switch in South Carolina early in 1998. Falvey Testimony at 355, 357, 360.

[27] For example, two CLECs, Sprint and ACSI, submitted testimony that BellSouth had failed to provide nondiscriminatory access to UNEs in Florida and Georgia, and, as a result, their customers had been disconnected, been unable to place calls, and, in fact, had canceled their service with these CLECs because of the inferior access provided by BellSouth. McNeely Aff. ¶¶ 27-31. BellSouth proposed -- and the SCPSC adopted -- the conclusion that such testimony does not "rise to the level of proof" and, more astonishingly, that even if such testimony could be considered evidence, it was irrelevant to the issue of BellSouth's checklist compliance. BellSouth/SCPSC Compliance Order at 59-60.